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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1973

No. 73-6877

HENRY N. JARRETTE,
Petitioner,

v.

THE STATE OF NORTH CAROLINA,
Respondent.

No. 73-6876

TOMMY NOELL,
Petitioner,

v.

THE STATE OF NORTH CAROLINA,
Respondent.

No. 73-6853

ALTON JAMES HENDERSON,
Petitioner,

v.

THE STATE OF NORTH CAROLINA,
Respondent.

No. 73-6878

ALBERT CROWDER, JR.,
Petitioner,

v.

THE STATE OF NORTH CAROLINA,
Respondent.

No. 73-6875

DAVID EARL DILLARD,
Petitioner,

v.

THE STATE OF NORTH CAROLINA,
Respondent.

No. 73-7031

JESSE THURMAN FOWLER,
Petitioner,

v.

THE STATE OF NORTH CAROLINA,
Respondent.

No. 73-7032

BILLY HONEYCUTT,
Petitioner,

v.

THE STATE OF NORTH CAROLINA,
Respondent.

* *
RESPONSE OF THE STATE OF NORTH CAROLINA
TO PETITIONS FOR WRITS OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA
* *

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Dated: September 20, 1974

INDEX

Page

Opinions Below. 2

Jurisdiction. 3

Questions Presented 3

I. IS CAPITAL PUNISHMENT, IPSO FACTO, CRUEL AND UNUSUAL PUNISHMENT WITHIN THE MEANING OF THE EIGHTH AMENDMENT? 3

II. WERE PETITIONERS' CONSTITUTIONAL RIGHTS TO PROCEDURAL DUE PROCESS OBSERVED BY NORTH CAROLINA AT THE PRE-TRIAL, TRIAL AND APPELLATE STAGES OF THE PROCEEDINGS?. 3

A. At The Pre-Trial Stage.

1. Were the constitutional rights exemplified in Miranda vs. Arizona 384 U.S. 436 (1966), observed by North Carolina in admitting into evidence extra-judicial statements?. 4

2. Is Constitutional due process violated where police do not investigate, ad infinitum, every possible shred of evidence thought by a defendant to have some relationship to the crime with which he is charged?. 4

3. Does the concept of constitutional due process prohibit police use of a "show up" identification procedure during the investigative stage of the case?. 4

4. Does constitutional due process in a mandatory death penalty case require the state to seat a juror who has testified on voir dire that because of his personal beliefs he would not return a verdict of guilty, even if satisfied from the evidence beyond a reasonable doubt as to the defendant's guilt? 4

5. Does constitutional due process require the state to furnish a transcript of the voir dire examination of the jury even though defendant has not requested such a transcript? 4

6. Does constitutional due process require that a jury include black members where the defendant is a black, even though there is no systematic exclusion of blacks from jury service? 4

7. Does constitutional due process require a change of venue for the trial of a criminal case merely upon the showing of wide publication of the crime involved? 4

B. At The Trial Stage. 5

1. Does the constitutional concept of due process require the exclusion of evidence of an independent in-court identification

Page

of the defendant as the perpetrator of the crime by the rape victim simply because the victim had previously identified the defendant as the perpetrator in a "show-up" during the investigation of the crime by the law officers?. 5

2. Does the constitutional concept of due process require a mistrial where a witness spontaneously and voluntarily gives evidence of a non-inflammatory nature and the trial judge immediately orders the testimony stricken and instructs the jury to disregard the spontaneous utterance of the witness? 5

3. Does constitutional due process require the trial judge to instruct the jury that if the jury convicts the defendant of rape the punishment shall be death, where neither the judge nor the jury have any discretion as to punishment upon conviction of a capital crime?. . . . 5

4. Does constitutional due process require that the state permit defense counsel to argue the propriety of the death penalty to the jury when neither the judge nor the jury has any discretion as to punishment upon conviction of a capital crime? 5

5. Does constitutional due process require the trial judge to instruct the jury as to lesser included offenses when the charge laid in the indictment and all of the state's evidence introduced at trial tend to prove that only the capital offense, if any, was committed?. 5

C. At The Appellate Stage 6

1. Does the concept of constitutional due process require that the state assume the burden of proving the negative of any issue raised by a defendant on appeal in a capital case? 6

Constitutional and Statutory Provisions Involved 6

Statement of the Cases 8

1. The Jarrette case (No. 73-6877). 9

2. The Noell case (No. 73-6876) 10

3. The Henderson case (No. 73-6853) 11

4. The Crowder case (No. 73-6878) 11

5. The Dillard case (No. 73-6875) 12

6. The Fowler case (No. 73-7031). 12

7. The Honeycutt case (No. 73-7032) 12

Page

Argument 13

I. THE DECISIONS BELOW ARE CLEARLY CORRECT. 13

A. CAPITAL PUNISHMENT, IPSO FACTO, IS NOT CRUEL AND UNUSUAL PUNISHMENT 13

B. THE NORTH CAROLINA GENERAL ASSEMBLY HAS CONSISTENTLY DECREED THE DEATH PENALTY FOR FIRST DEGREE MURDER AND RAPE FOR NEARLY TWO HUNDRED YEARS, IN 1974, IT REAFFIRMED THAT POLICY 16

C. THE MERE EXISTENCE OF PROSECUTORIAL DISCRETION, PLEA BARGAINING, AND EXECUTIVE CLEMENCY DO NOT BRING A MANDATORY DEATH PENALTY STATUTE WITHIN THE PROHIBITIONS OF THE FURMAN DECISION. 21

D. CONTEMPORARY STANDARDS OF ONE OR MORE STATES OR THE FEDERAL GOVERNMENT CANNOT BE THE BASIS FOR ABROGATING RIGHTS OF OTHER STATES RESERVED TO THEM BY THE TENTH AMENDMENT TO THE CONSTITUTION 21

II. NO CONFLICT OF DECISIONS BETWEEN NORTH CAROLINA AND THIS COURT IS PRESENTED BECAUSE PETITIONERS' CONSTITUTIONAL RIGHTS TO PROCEDURAL DUE PROCESS WERE FULLY OBSERVED BY NORTH CAROLINA AT EACH STAGE--PRE-TRIAL, TRIAL AND APPELLATE--OF THE PROCEEDINGS. . . . . .

A. At the Pre-trial Stage 26

1. The petitioner Jarrette's constitutional rights exemplified in Miranda v. Arizona, 384 U.S. 436 (1966) were observed by law officers interrogating Jarrette after his arrest 26

2. Constitutional due process is not violated where police do not investigate, ad infinitum, every possible shred of evidence thought by a defendant to have some relationship to the crime with which he is charged . 28

3. The concept of constitutional due process does not prohibit police use of a "show up" identification procedure during the investigative stage of the case. 29

4. Constitutional due process in a mandatory death penalty case does not require the state to seat a juror who has testified that because of his personal beliefs he would not return a verdict of guilty, even if satisfied from the evidence beyond a reasonable doubt as to the defendants guilt. 31

5. Constitutional due process does not require the state to furnish a transcript of the

voir dire examination of the jury when defendant has not requested such a transcript 33

6. Constitutional due process does not require that a jury include black members where the defendant is a black when there is no systematic exclusion of blacks from jury service. 34

7. Constitutional due process does not require a change of venue for the trial of a criminal case merely upon the showing of wide publication of the crime involved. 36

B. At the Trial Stage 37

1. The constitutional concept of due process does not require the exclusion of evidence of an independent in-court identification of the defendant as the perpetrator of the crime by the rape victim simply because the victim had previously identified the defendant as the perpetrator in a "show up" during the investigation of the crime by the law officers 37

2. The constitutional concept of due process does not require a mistrial where a witness spontaneously and voluntarily gives evidence of a non-inflammatory nature and the trial judge immediately orders the testimony stricken and instructs the jury to disregard the spontaneous utterance of the witness 40

3. Constitutional due process does not require the trial judge to instruct the jury that if the jury convicts the defendant of rape the punishment shall be death, where neither the judge nor the jury have any discretion as to punishment upon conviction of a capital crime. 42

4. Constitutional due process does not require that the state permit defense counsel to argue the propriety of the death penalty to the jury when neither the judge nor the jury has any discretion as to punishment upon conviction of a capital crime. 44

5. Constitutional due process does not require the trial judge to instruct the jury as to lesser included offenses when the charge laid in the indictment and all of the state's evidence introduced at trial, tend to prove that only the capital offense, if any, was committed 45

C. At the Appellate Stage 47

1. The concept of constitutional due process does not require that the state assume the burden of proving the negative of any issue raised by a defendant on appeal in a capital case . . 47

Page

Conclusion 48

Certificate of Service 49

TABLE OF AUTHORITIES

Page

Cases

Federal

Brady v. Maryland, 373 U.S 83 (1963). 29

Chambers v. Mississippi, 410 U.S. 284 (1973). 33

Estes v. Texas, 381 U.S. 532 (1965) 37

Furman v. Georgia, 408 U.S. 238 (1972). 2,7,8,14,15,21,31

Gideon v. Wainwright, 372 U.S. 335 (1963) 34

Giles v. Maryland, 386 U.S. 66 (1967) 29

Groppi v. Wisconsin, 400 U.S. 505 (1971). 37

Grundler v. North Carolina, 283 F. 2d 798 (4th Cir. 1960). 47

Hunter v. Martin's Lessee, 14 U.S. 303 (1816) 23

Irvin v. Dowd, 366 U.S. 717 (1960). 37

Johnson v. New Jersey, 384 U.S. 719 (1966). 19

Kirby v. Illinois, 406 U.S. 682 (1972). 30

McCulloch v. Maryland, 17 U.S. 316 (1819) 23

Miranda v. Arizona, 384 U.S. 436 (1966) 4,26,27

Neil v. Biggers, 409 U.S. 188 (1973). 29,38

Powell v. Texas, 392 U.S. 514 (1968). 13

Rideau v. Louisiana, 373 U.S. 723 (1962). 37

Robinson v. California, 370 U.S. 660 (1962) 13

Sheppard v. Maxwell, 384 U.S. 333 (1965). 37

Stovall v. Denno, 388 U.S. 293 (1967) 39

Swain v. Alabama, 380 U.S. 202 (1965) 35

United States v. Richard M. Nixon, ____U.S.____, 41 L.Ed. 2d 1039 (1974). 21,22

Wardius v. Oregon, 412 U.S. 470 (1973). 29

Williams v. Georgia, 349 U.S. 375 (1954). 33

Witherspoon v. Illinois, 391 U.S. 510 (1968). 31,32,34

State

Housing Authority of Wilson v. Wooten, 257 N.C. 358, 126 S.E. 2d 101 (1962) 48

People v. Allen, 351 Mich. 535 (1958) 28

People v. Baber, 31 Mich. App. 106, 187 N.W. 2d 508 (1971) 28

State v. Blackmon, 280 N.C. 42, 185 S.E. 2d 123 (1971) 37

Page

State v. Britt, 285 N.C. 256 (1974) 43, 44, 45

State v. Crisp, 244 N.C. 407, 94 S.E. 2d 402, 67 A.L.R. 2d 236 (1956). 45

State v. Crowder, 285 N.C. 42, 203 S.E. 2d 38 (1974). 11

State v. Dillard, 285 N.C. 72, 203 S.E. 2d 6 (1974) 12, 44

State v. Fowler, 285 N.C. 90, 203 S.E. 2d 803 (1974) 33, 34

State v. Gaston, 236 N.C. 499, 73 S.E. 2d 311 (1952) 12, 42

State v. Henderson, 285 N.C. 1, 203 S.E. 2d 10 (1974) 11, 28, 42, 43, 44

State v. Honeycutt, 284 N.C. 625, 202 S.E. 2d 844 (1974) 12

State v. Jarrette, 284 N.C. 625, 202 S.E. 2d 721 (1974) 9, 20, 21

State v. Kelly, 110 Ariz. 196, 516 P. 2d 569 (1973) 28

State v. Knight, 269 N.C. 100, 152 S.E. 2d 179 (1967) 35

State v. Noell, 284 N.C. 683, 202 S.E. 2d 750 (1973) 10, 28

State v. Peoples, 131 N.C. 784, 42 S.E. 314 (1902) 35

State v. Rhodes, 275 N.C. 584, 160 S.E. 2d 846 (1969) 42

State v. Spencer, 256 N.C. 487, 124 S.E. 2d 175 (1962) 46

State v. Tuggle, 284 N.C. 515, 201 S.E. 2d 884 (1973) 39

State v. Vance, 277 N.C. 345, 177 S.E. 2d 389 (1970) 46

State v. Waddell, 282 N.C. 431, 194 S.E. 2d 19 (1973) 7, 8, 13, 14, 15, 16 17, 18, 19 32, 42

State v. Walston, 259 N.C. 385, 130 S.E. 2d 636 (1963) 46

Page

Federal Constitution

U. S. Const. amend. VIII 3,6,13,14,24,25

U. S. Const. amend. X. 6,24,25

U. S. Const. amend. XIV, §1. 6

Federal Statutes and Rules

28 U.S.C. §1257 (3) 3

Rule 23 (5), Rules of The Supreme Court. 1

Rule 19 (1), Rules of The Supreme Court. 2

State Constitution

N. C. Const. Art. XI §2. 6

N. C. Const. Art. I, §24 35

State Statutes

N. C. Gen. Stat. §1-84 37

N. C. Gen. Stat. §4-1. 7,16

N. C. Gen. Stat. §14-17. 7,15

N. C. Gen. Stat.§14-21 7,15

N. C. Gen. Stat. §14-52. 15

N. C. Gen. Stat. §14-58 15

N. C. Gen. Stat. §15-187 8

N. C. Gen. Stat. §15-188 8

N. C. Gen. Stat. §148-58. . . . . 9 fn

Other

Hamilton, The Federalist (No. 45), "The Powers delegated by the proposed Constitution to the federal government are few and defined." 23

Mason, Free Government in the Making, 3rd ed., Oxford University Press (1965). 22

Pound, Jurisprudence, Vol. II, (1959). 24,25

Pound, Jurisprudence, Vol. III (1959). 25

Scott, Sovereign States and Suit, (1925). 23

1 Strong's N.C. Index 2d, p. 106 (1967) 33

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• •

RESPONSE OF THE STATE OF NORTH CAROLINA
TO PETITIONS FOR WRITS OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

• •

Pursuant to Rule 23(5) of the Rules of the Supreme Court, respondent files herewith its consolidated response to the captioned petitions for writs of certiorari to the Supreme Court of North Carolina. They each seek certiorari to the same court and involve an identical question, as well as other closely related questions.

The State of North Carolina, respondent, has no objection to this court issuing writs of certiorari to the Supreme Court of North Carolina in the captioned cases, limited to the single question of whether the State's imposition of death by administering lethal gas to duly convicted first degree murderers and rapists who consummate the rape by force and violence, constitutes "cruel and unusual" punishment within the meaning of the Eighth Amendment to the Constitution of the United States of America.

The respondent acknowledges there may be special and important reasons for granting the writs (Rule 19(1), Rules of the Supreme Court). Among these are: (1) This State's highest court has answered the foregoing federal question of substance in the negative and the question has not heretofore been directly determined by this court; and (2) even though the constitutionality of the death penalty per se has been heretofore recognized by this court, the recent decision in Furman v. Georgia, 408 U.S. 238, 33L.Ed. 2d 346, 92 S.Ct. 2726 (1972) has cast an uncertain light upon this court's construction of the State's power to define criminal conduct and prescribe punishment for those engaging in such conduct, which power was specifically reserved to the States pursuant to the Tenth Amendment to the Constitution of the United States of America.

OPINIONS BELOW

The opinions of the Supreme Court of North Carolina, in the captioned cases listed in the chronological order of these decisions are:

1. State of North Carolina v. Henry N. Jarrette, 284 N.C. 625, 202 S.E. 2d 721 (1974).
2. State of North Carolina v. Tommy Noell, 284 N.C. 670, 202 S.E. 2d 750 (1974).

3. State of North Carolina v. Alton James Henderson, 285 N.C. 1, 203 S.E. 2d 10 (1974).

4. State of North Carolina v. Albert Crowder, Jr., 285 N.C. 42, 202 S.E. 2d 38 (1974).

5. State of North Carolina v. David Earl Dillard, 285 N.C. 72, 203 S.E. 2d 6 (1974).

6. State of North Carolina v. Jesse Thurman Fowler, 285 N.C. 90, 203 S.E. 2d 803 (1974).

7. State of North Carolina v. Billy Honeycutt, 285 N.C. 174, 203 S.E. 2d 844 (1974).

JURISDICTION

Petitioners seek to invoke the jurisdiction of this court pursuant to 28 U.S.C. § 1257 (3), by alleging a deprivation of rights that they contend are secured by the Constitution of the United States of America.

QUESTIONS PRESENTED

I. Is capital punishment, ipso facto, cruel and unusual punishment within the meaning of the Eighth Amendment to the Constitution of the United States of America? (Petitioners' Question No. 1, in each of the captioned petitions, except Henderson. Petitioner Henderson's Question Nos. 6-10).

II. Were the petitioners' constitutional rights to procedural due process observed by North Carolina at the pre-trial, trial and appellate stages of the proceedings?

A. At the Pre-trial Stage.

1. Were the Constitutional rights exemplified in Miranda vs. Arizona, 384 U.S. 436 (1966), observed by North Carolina in admitting into evidence extra-judicial statements? (Petitioner Jarrette's Question No. 4).

2. Is constitutional due process violated where police do not investigate, ad infinitum, every possible shred of evidence thought by a defendant to have some relationship to the crime with which he is charged? (Petitioner Noell's Question No. 4; Petitioner Henderson's Question No. 14).

3. Does the concept of constitutional due process prohibit police use of a "show up" identification procedure during the investigative stage of the case? (Petitioner Henderson's Question Nos. 1 and 3).

4. Does constitutional due process in a mandatory death penalty case require the state to seat a juror who has testified on voir dire that because of his personal beliefs he would not return a verdict of guilty, even if satisfied from the evidence beyond a reasonable doubt as to the defendants' guilt? (Petitioner Noell's Question No. 2; Petitioner Jarrette's Question No. 2).

5. Does constitutional due process require the state to furnish a transcript of the voir dire examination of the jury to the defendant even though he has not requested such a transcript? (Petitioner Honeycutt's Question No. 2).

6. Does constitutional due process require that a jury include black members where the defendant is a black, even though there is no systematic exclusion of blacks from jury service? (Petitioner Noell's Question No. 5).

7. Does constitutional due process require a change of venue for the trial of a criminal case merely upon the showing of wide publication of the crime involved? (Petitioner Jarrette's Question No. 4).

B. At the Trial Stage.

1. Does the constitutional concept of due process require the exclusion of evidence of an independent in-court identification of the defendant as the perpetrator of the crime by the rape victim simply because the victim had previously identified the defendant as the perpetrator in a "show-up" during the investigation of the crime by the law officers? (Petitioner Henderson's Question Nos. 2, 4 and 5).

2. Does the constitutional concept of due process require a mistrial where a witness spontaneously and voluntarily gives evidence of a non-inflammatory nature and the trial judge immediately orders the testimony stricken and instructs the jury to disregard the spontaneous utterance of the witness? (Petitioner Noell's Question No. 4; Petitioner Crowder's Question No. 2).

3. Does constitutional due process require the trial judge to instruct the jury that if the jury convicts the defendant of rape the punishment shall be death, where neither the judge nor the jury have any discretion as to punishment upon conviction of a capital crime? (Petitioner Henderson's Question Nos. 11 and 12).

4. Does constitutional due process require that the state permit defense counsel to argue the propriety of the death penalty to the jury when neither the judge nor the jury has any discretion as to punishment upon conviction of a capital crime? (Petitioner Dillard's Question No. 2).

5. Does constitutional due process require the trial judge to instruct the jury as to lesser included offenses when the charge laid in the indictment and all of the state's evidence introduced at trial tends to prove that only the capital offense, if any, was committed? (Petitioner Henderson's Question No. 13).

C. At the Appellate Stage.

1. Does the concept of constitutional due process require that the state assume the burden of proving the negative of any issue raised by a defendant on appeal in a capital case? (Petitioner Henderson's Question No. 10).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. Constitutional Provisions.

A. These cases involve the Eighth, Tenth and Fourteenth Amendments to the Constitution of the United States of America which provide, inter alia:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. (U.S. Const. amend. VIII).
>
> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people. (U.S. Const. amend. X).
>
> . . .No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (U.S. Const. amend. XIV, §1.).

B. Additionally they involve the Constitution of North Carolina, Article XI, which provides:

> §2. Death punishment. The object of punishments being not only to satisfy justice, but also to reform the offender and thus prevent crime, murder, arson, burglary, and rape, and these only, may be punishable with death, if the General Assembly shall so enact.

II. Statutory Provisions.

These cases also involve the following provisions of the General Statutes of North Carolina as construed by the North Carolina Supreme Court in State v. Waddell, 282 N. C. 431, 194 S. E. 2d 19, (1973) applying this court's decision in Furman v. Georgia, 408 U.S. 238 (1972):

A. N. C. General Statute § 4-1. Common Law declared to be in force.-

> All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State.

B. N. C. General Statute §14-17. Murder in the first and second degree defined; punishment.-

> A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: *Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury.** All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison.

C. N. C. General Statute § 14-21 Punishment for rape.

> Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more, by force and against her will, or who is convicted of

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* Subsequent to this Court's decision in Furman, the North Carolina Supreme Court in State v. Waddell 282 N. C. 431, 194 S.E. 2d 19 (1973) declared the portions set forth in italics above were unconstitutional.

unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death: Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the Court shall so instruct the jury.*/

D. N. C. General Statute §15-187. Death by administration of lethal gas. -

Death by electrocution under sentence of law is hereby abolished and death by the administration of lethal gas substituted therefor.

E. N.C. General Statute §15-188. Manner and place of execution.-

The mode of executing a death sentence must in every case be by causing the convict or felon to inhale lethal gas of sufficient quantity to cause death, and the administration of such lethal gas must be continued until such convict or felon is dead. . . .

STATEMENT OF THE CASE

Considering that petitioners are each in extremis, the hyperbolic and vituperative content of their petitions is understandable even though unsupported by the evidence of record, the facts found arising from that evidence or the law itself as applied in North Carolina. Thus respondent will bypass the invective and respond only to the merits of the questions raised.

However, respondent notes the petitions are replete with references to other states' statutes and their interpretations by the highest courts of those states. As North Carolina spends full time enforcing its laws in a positive manner, it deems it unnecessary to respond to other states' actions as portrayed to this court by petitioners. After all, it is North Carolina's laws which petitioners violated and it is North Carolina which will enforce those laws which are ultimately held to be in accordance with the Constitution of the United States by this court.

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* Subsequent to this Court's decision in Furman, the North Carolina Supreme Court in State v. Waddell 282 N.C. 431, 194 S.E. 2d 19 (1973) declared the portions set forth in italics above were unconstitutional.

1. The Jarrette case, No. 77-6977 [284 N.C. 625, 202 S.E.2d 721 (1978)].

Henry Jarrette, a black man, was an escaped murderer. Within 48 hours of his escape he raped, by force and violence, Gwendolyn Blackmon, an unarmed and helpless sixteen year old black girl. Shortly thereafter he murdered David Parker, an unarmed and helpless sixteen year old white boy by plunging a knife into his chest. Jarrette was sentenced to death for each of the foregoing crimes.

Before escaping, Jarrette was in prison serving life sentences for two different murders. Through a program inspired by humanitarian values and based upon the concept that a convicted felon might, given a reasonable opportunity, be rehabilitated; the N.C. Department of Corrections and the N. C. Junior Charber of Commerce developed a furlough program whereby Jaycee units were established within the prison system of North Carolina. Such a Jaycee unit was established in the custodial institution to which Jarrette was assigned.

Jarrette rose to the office of president of his local Jaycee unit and was nominated for an award for his work there. He was escorted by a prison guard to the state's capital to receive an award. Notwithstanding that he would be eligible for parole after serving 20 years of his life sentence for murder,* Jarrette escaped.

Within 48 hours, Jarrette had kidnapped and raped Gwendolyn Blackmon. He rode around in her car, holding her hostage, until he could find another car. He told her she was lucky she was black, for if she were white he would kill her.

Jarrette then observed a car parked at a laundromat occupied by a single occupant, sixteen year old David Parker. Jarrette approached Parker's car and said something to Parker while standing at the driver's open window. Jarrette reached into the open window and stabbed Parker to death.

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* §148-58. Time of eligibility of prisoners to have cases considered. - All prisoners shall be eligible to have their cases considered for parole . . .any prisoner serving sentence for life shall be eligible for such consideration when he has served 20 years of his sentence.

Jarrette fled the state and was captured by agents of the FBI in Tennessee. They warned him of all his rights guaranteed to him by the Constitution of the United States. Jarrette confessed. He was returned to North Carolina, furnished astute counsel at every stage of the judicial proceedings charged, and tried by a fair and impartial jury.

Jarrette was convicted and sentenced to die in the gas chamber at the state's prison in Raleigh by administration of lethal gas.

Appeal to the Supreme Court of North Carolina of any sentence of death is mandatory by the law of North Carolina. Appeal was had and affirmed.

2. The Noell case, No. 77-6870
[288 N. C. 628, 242 S. E. 2d 750 (1978)].

Terry Noell is a black male who by force and violence raped Linda DiCenzo, a young white female practical nurse.

Noell gained entry into Miss DiCenzo's apartment by trick in the late morning hours, having followed her home around 8:30 a. m. after she had gotten off work at N. C. Memorial Hospital in Chapel Hill, N. C.

Noell brutally beat Miss DiCenzo and choked her until she submitted. The degree of violence to her body was fully described by the testimony of impartial witnesses.

Noell was fully identified by his victim as the perpetrator of the crime which occurred during full daylight hours. There was other corroborative evidence of his presence at the scene of the crime at the time it occurred.

Noell never confessed to the crime. His defense was an alibi which was never established. After receiving all of the procedural safeguards guaranteed to him by both North Carolina and Federal Constitutions and Acts of the North Carolina General Assembly, Noell was convicted and sentenced to die. His conviction was affirmed upon appeal.

7. The Henderson case. No. 77-6953
[295 N.C.1, 243 S.E.2d 10 (1978)]

Alton James Henderson is a white male who by force and violence raped Judith Strader a white woman. Henderson entered Miss Strader's home in the late evening while she was asleep.

Henderson was able to consumate the rape only after Miss Strader had torn her fingernails from her hands in resistence, and he had severely beaten her and choked her until she thought everything was going to pop out of her head.

After the rape, she talked to Henderson for more than thirty minutes and could see his face clearly from a utility company light outside her bedroom window. There was other corroborative identification of Henderson as the perpetrator of the rape.

Henderson never confessed, but like Jarrette, Henderson fully received the benefits of all constitutionally guaranteed safeguards as established by both the North Carolina and United States Constitutions, as well as those procedural safeguards established by the Acts of the N. C. General Assembly and the decisions of the North Carolina Supreme Court.

He had astute counsel. Upon being convicted, he was sentenced to die. Upon appeal to the Supreme Court of North Carolina no prejudicial error was found to have occurred in his trial. His conviction and sentence were therefore affirmed.

8. The Crowder case. No. 77-6878
[295 N. C. 42, 243 S. E. 2d 98 (1978)]

Albert Crowder, Jr., a black man, shot and killed Penny Bryant, a black woman with a .38 caliber pistol.

Crowder called Miss Bryant, his former girlfriend, out of a house. He told her he had something for her brother, whereupon he shot her in the head, killing her.

He was convicted of first degree murder and sentenced to die. On appeal no prejudicial error was found to have occurred in his trial.

5. The Dillard Case, No. 77-6[illegible]
[295 N. C. 77, 243 S. E. 2d 6 (1978)].

David Earl Dillard, a black man, shot and killed his wife, Mattie Dillard, a black woman, with a shotgun in a church while she was attending church services on an Easter Sunday morning.

Dillard's counsel emphasizes that Dillard made no threatening gestures or hostility to the armed arresting officers subsequent to the killing. Perhaps they seek to demonstrate his kindly and worthwhile character after he had completed his mission of cold blooded murder.

Dillard too, as was his right, received at each step of the proceedings against him the best defense and most impartial administration of justice man has been able to devise.

He too was convicted by a jury of his peers and was sentenced to die in the gas chamber and this sentence was affirmed.

6. The Fowler Case, No. 77-7031
[295 N. C. 84, 243 S. E. 2d 893 (1978)]

Jesse Fowler, a black man, had an argument and fist fight with John Griffin over a ten dollar bill. Fowler, after a sufficient cooling off period went to his home. Fowler took a .38 pistol and shot Griffin to death. A few hours later, at the urging of his wife and a friend, Fowler went to the police to explain what happened. He was advised of his rights, and waived them, indicating his desire to make a statement without the presence of counsel. Fowler was duly tried, convicted and sentenced to death. On appeal, no prejudicial error was found by the N. C. Supreme Court and the judgment was affirmed.

7. The Honeycutt Case, No. 77-7033
[295 N. C. 635, 582 S. E. 2d 888 (1978)]

Just prior to June 6, 1977, Billy Honeycutt, a black man, his wife, Brenda, a black woman, and their nine year old daughter, Billy Jean, lived together in a trailer. At least three days prior to the date on which Billy killed his wife, he told friends

that he was going to kill her. Then, on June 6, 1973, Billy told his wife, "If I can't have you, then no one can." He then took a butcher knife from his pants and stabbed his wife repeatedly as she tried to flee down the hall. Defendant's daughter, Billie Jean, ran to a neighbor's house to get help for her mother. The Duplin County sheriff's department was called and Deputy Sheriff Procter responded. He testified that when he arrived he found the body of Brenda in the trailer. He found Honeycutt on the premises and advised him of his constitutional rights. Upon being told that she was dead Honeycutt said, "Ha, I'm damn glad of it."

ARGUMENT

I. The Decisions below are Clearly Correct.

A. CAPITAL PUNISHMENT, PER SE, IS NOT CRUEL AND UNUSUAL PUNISHMENT WITHIN THE MEANING OF THE EIGHTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The proscription of cruel and unusual punishment is applicable to the states through the Due Process clause of the Fourteenth Amendment. Powell v. Texas, 392 U.S. 514 (1968); Robinson v. California, 370 U.S. 660 (1962). The North Carolina Supreme Court so held in State v. Waddell, 282 N.C. 431, at page 436, 194 S.E.2d 19(1973).

Since the beginning of the United States as a separate nation two hundred years ago, death sentences have been administered by both the federal and state governments for a variety of crimes. As the North Carolina Supreme Court noted in Waddell, id. at page 436:

> Prior to the decision in Furman v. Georgia the United States Supreme Court implicitly approved or, albeit in dictum, expressly upheld the constitutionality of capital punishment in many cases, including Wilkerson v. Utah, 99 U.S. 130, 25 L.Ed 345 (1879); In re Kemmler, 136 U.S. 436, 34 L.Ed. 519, 10 S.Ct. 930 (1890); Weems v. United States, 217 U.S. 349, 58 L.Ed. 793, 30 S.Ct. 544 (1910); Louisiana ex rel. Francis v. Resweber,

329 U.S. 459, 91 L.Ed. 422, 67 S.Ct. 374 (1947); Trop v. Dulles, 356 U.S. 86, 2 L.Ed. 2d 630, 78 S.Ct. 590 (1958); Witherspoon v. Illinois, 391 U.S. 510, 20 L.Ed. 2d 776, 88 S.Ct. 1770 (1968); McGautha v. California, 402 U.S. 183, 28 L.Ed. 2d 711, 91 S.Ct. 1454 (1971). Thus, since the ratification of the Eighth Amendment one hundred eighty-one years ago, no decision of the United States Supreme Court prior to Furman casts the slightest doubt on the constitutionality of capital punishment.

Nor is there reason to believe this court now considers capital punishment to be cruel and unusual punishment, per se, within the meaning of the Eighth Amendment. In Furman v. Georgia, 408 U.S. 238 (1972), the justices of this court went to some length to explain that they did not reach that question.

As the North Carolina Supreme Court noted in the Waddell case:

> "Mr. Justice Douglas. . .wrote. . .'Whether a mandatory death penalty would otherwise be constitutional is a question I do not reach . . .'(282 N.C. at 437).
>
> "Mr. Justice Stewart. . .expressed his views as follows... 'The constitutionality of capital punishment in the abstract is not . . .before us in [Furman]. . .'(282 N.C. at p. 437-438).
>
> "Mr. Justice White. . .depicts his views... [thusly]. . .'I do not at all intimate that the death penalty is unconstitutional per se or that there is no system of capital punishment that would comport with the Eighth Amendment. . .'(282 N.C. at 438).
>
> Four members of the [U.S. Supreme] court dissented [in Furman]. The position of the four dissenters is best summed up by Chief Justice Burger as follows: . . . 'Today the Court has not ruled that capital punishment is per se violative of the Eighth Amendment; nor has it ruled that punishment is 'barred' for any particular class of classes or crimes. . .'(282 N.C. at 439).

Thus, our court having to apply this court's Furman decision in Waddell, at 282 N.C. 439, held:

> The foregoing quotations from the various separate opinions in Furman compel the conclusion that capital punishment has not been declared unconstitutional per se. Rather, the Furman decision holds that the Eighth and Fourteenth Amendments will no longer tolerate the infliction of the death sentence if either judge or jury is permitted to impose that sentence as a matter of discretion.

The Waddell case was tried prior to the Furman decision, and Waddell was sentenced to death. It was the first case to reach the N. C. Supreme Court subsequent to Furman. The N. C. Supreme Court then applied this court's Furman decision to Waddell and ordered his death sentence be vacated and that he be sentenced to life imprisonment, 282 N. C. at 887.

The N. C. Supreme Court further declared unconstitutional the following provisions of N. C. Gen. Stat. §§ 14-17 (murder), 14-21 (rape); 14-52 (burglary); and 14-58 (arson):

> Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury.

For the reasons set forth in its opinion, our court demonstrated that the proviso clause was clearly severable from the clause setting forth the punishment as established by the General Assembly. See Waddell, 282 N. C. at pages 841-845.

The Waddell decision thus left death as the only permissible punishment in North Carolina for the crimes of first degree murder, rape, burglary and arson. The North Carolina Constitution of 1970 specifically provided for such punishment.

Our court in Waddell went even further to protect the constitutional rights of its citizens against Ex Post Facto laws, for at 282 N. C. at page 846, it held:

> North Carolina's mandatory death penalty for rape, murder in the first degree, burglary in the first degree and arson may not be constitutionally applied to any offense committed prior to the date of this decision but shall be applied to any offense committed after such date. (Emphasis added).

Thus, it can be seen that petitioners' assertion that the North Carolina Supreme Court has attempted to evade the Furman decision by "tortured" reasoning and "similar manipulations" designed "to emasculate a constitutional decision of the U. S. Supreme Court" constitute journalistic license more common to editorial excesses than reasoned and responsible arguments in a court of law.

II. THE NORTH CAROLINA GENERAL ASSEMBLY HAS CONSISTENTLY DECREED THE DEATH PENALTY FOR FIRST DEGREE MURDER AND RAPE FOR NEARLY TWO HUNDRED YEARS. IN 1970 IT REAFFIRMED THAT POLICY.

In 1778, the State of North Carolina enacted what is now codified as G. S. 4-1 which states:

> All such parts of the common law as were heretofore in force and use within this State, or so much of the Common Law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State.

As both murder and rape were capital felonies under the common law, they became so in North Carolina in 1778. Thus death has been the punishment for murder in the first degree and rape in North Carolina for nearly two hundred years. Waddell, supra at p. 881.

It was in 1949 that our present statutes providing for punishment in capital cases were amended. Prior to that time the punishment was death.

The amendments to each of our capital punishment statutes added the proviso which (1) empowered the jury in its discretion to recommend and thus to fix the punishment at life imprisonment, and (2) required the trial judge to so instruct the jury. Waddell, supra at 881.

The legislative history of the subject is succinctly set forth in the Waddell decision at pages 881 and 882, as follows:

> Since the 1949 amendment adding the proviso, seventeen bills or resolutions have been introduced in the General Assembly of North Carolina designed to abolish or limit the imposition of the death penalty for rape or other capital offenses. See House Bills 938, 935, 937 and 939 in the 1955 Session; House Bill 113 in the 1961 Session; House Bill 35, Senate Bill 27 and Senate Resolution 17 in the 1963 Session; House Bills 102 and 251 in the 1965 Session; House Bills 69, 71, 139 and 318 in the 1967 Session; House Bill 160 in the 1969 Session; and House Bill 327 and Senate Bill 251 in the 1971 Session. All of these bills and resolutions failed to receive a favorable report from the committee to which referred, or were tabled or defeated on the floor of the House in which introduced.

The new State Constitution, which was ratified by the people in the general election of 1970, retained the provision contained in the former Constitution of North Carolina authorizing the General Assembly to provide by statute for the imposition of the death penalty for murder, arson, burglary and rape. See Constitution of North Carolina, Article XI, Section 2. Thus, there is nothing in the legislative or constitutional history of this State to indicate an intent by the Legislature, or by the people, to reduce the punishment for rape from death to life imprisonment, or to indicate that the 1949 proviso was enacted for that purpose except upon the discretionary recommendation of the jury, or to indicate that such proviso would have been enacted at all had its unconstitutionality been foreseen by the 1949 General Assembly. Rather, such history demonstrates a constant intent by the people and their representatives to retain the death penalty for murder, arson, burglary and rape notwithstanding the proviso added in 1949.

It is the proviso, and the proviso alone which creates the discretionary difficulty condemned by the Furman decision and it is quite clear that Furman strikes down the proviso; as violative of the Eighth and Fourteenth Amendments.

The question which the North Carolina Supreme Court was confronted with was:

> Does the remainder of G. S. 14-21 stand alone with death as the mandatory punishment for rape? Or, is the proviso such a constituent and inherent part of a single statutory scheme of punishment that it is inseverable and the entire statute must fall?

It was the sole duty and responsibility of our Supreme Court to answer that question. Justice Lake, speaking in a concurring opinion in Waddell, summed up that duty as concisely as can be done at 282 N. C. 88f and 89a. He said:

> The Supreme Court of the United States being the higher authority on the validity of judgments under the Constitution of the United States, its mandates, issued in reliance upon Furman v. Georgia, 408 U. S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 346, vacating the death sentences previously affirmed by this Court in the five cases cited in the opinion of Justice Bobbins, became the law of those five cases. Under the compulsion of those mandates, this Court remanded those cases to the respective superior courts for the imposition of sentences of life imprisonment.
>
> The present case, on the contrary, is before us for the first time. In it we have no mandate from the Supreme Court of the United States vacating the death sentence imposed upon this defendant. In the absence thereof, it is our duty, not that of the Legislature, to determine just what the United States Supreme Court decided in Furman v. Georgia, supra, and to determine the present state of the law of North Carolina with reference to punishment for the crime of rape in the light of that decision.

> Only this Court can determine whether any portion of G. S. 14-21 is the law of North Carolina today and, if so, which portion. The Legislature , now in session, cannot make that determination. The Legislature can determine what the law of this State ought to be and shall be in the future. That is policy making and that is the Legislature's prerogative and responsibility. It is for us, and for us alone, to determine what part of G. S. 14-21, if any, is the law of North Carolina today and determinative of the validity of the sentence from which this defendant appeals. That is not policy making but the interpretation of the statute - an exercise of the judicial functica which we may not abdicate or assign to the Legislature. Constitution of North Carolina, Art. I, § 6; Art. IV, §1

> It is quite clear, as the opinion of Justice Huskins plainly states, that it is for the Legislature, not for this Court, to determine the policy of this State as to what acts shall be deemed crimes and as to the punishment therefor; that is, to determine what punishment ought to be and shall be imposed for the offense of rape, hereafter committed. Constitution of North Carolina, Art. I, § 6; Art. II, § 1; Art XI, § 2. But the Legislature has spoken in G. S. 14-21 and, until it speaks again, it is the duty of this Court to determine what, if anything, remains of its pronouncement in G. S. 14-21 after the decision in Furman v. Georgia, supra. No officer or agency, save this Court, can make that determination.

> ...Whether a statute is separable or inseparable is a question of statutory interpretation. It is well settled that the interpretation of a state statute is a question to be determined by the supreme court of the state. The Supreme Court of the United States has repeatedly accepted as binding upon it the interpretation placed upon state statutes by the highest courts of such states.

> Thus, the Supreme Court of the United States has not said, and may not properly determine that G.S. 14-21 is or is not separable. What it has said in Furman v. Georgia, supra , is that the discretion which the proviso in G.S. 14-21 undertook to vest in North Carolina juries cannot be conferred upon them consistently with the Fourteenth Amendment. It having so held, it is now the prerogative and duty of this Court, and this Court alone, to determine whether the proviso is severable from the original statute unto which the proviso was attached by amendment in 1949. Thus, it is the date of the decision of that question by this Court -- today -- not the date of the decision in Furman v. Georgia, supra, which fixes the offenses of rape for which a death sentence may be imposed without running afoul of the Ex Post Facto principle.

The Supreme Court of North Carolina answered the question it was confronted with in Waddell as follows:

> The original portion of G.S. 14-21 with its mandatory death penalty for rape stood alone and was given full effect by the courts of this State for a century prior to the enactment of the 1949 proviso. Grammatically, as well as historically, the two portions of the statute are distinct and separate and the constitutional invalidity of the added portion will not destroy the part which was in existence prior to the enactment of the unconstitutional portion. (282 N. C. at 882-883).
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> In light of the authorities cited, we hold that the unconstitutional proviso in G.S. 14-21 is severable and the remainder of the statute with death as the mandatory punishment for rape remains in full force and effect. (282 N. C. at 884-885).
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> We recognize that the Legislature, not the courts, decides public policy, responds to public opinion and, by legislative enactment, reflects society's standards. The matter of retention, modification or abolition of the death penalty is a question for the law-making authorities rather than the courts. In view of the decision in Furman, the Legislature may wish to delete the unconstitutional proviso from G.S. 14-21 (rape), G.S. 14-17 (murder), G.S. 14-52 (burglary), and G.S. 14-58 (arson); or it may wish to rewrite these statutes altogether to give expression to what it conceives to be the public will. Meanwhile, we hold that the effect of the Furman decision upon the law of North Carolina concerning the punishment for rape, murder in the first degree, arson and burglary in the first degree is this: Upon the trial of any defendant so charged, the trial judge may not instruct the jury that it may in its discretion add to its verdict of guilty a recommendation that defendant be sentenced to life imprisonment. The trial judge should charge on the constituent elements of the offense set out in the bill of indictment and instruct the jury under what circumstances a verdict of guilty or not guilty should be returned. Upon the return of a verdict of guilty of any such offense, the court must pronounce a sentence of death. The punishment to be imposed for these capital felonies is no longer a discretionary question for the jury and therefore no longer a proper subject for an instruction by the judge. (282 N. C. at 885).

In the application of its decision in Waddell, the North Carolina Supreme Court directed that the death penalty could not be imposed on any criminal whether tried or not for any capital offense committed at or before the time of the finding of its decision on January 18, 1973. (282 N. C. at 886). Compare Johnson v. New Jersey, 384 U.S. 719 (1966).

Thus it is seen that except for the citations, petitioners' characterization at pages 23-27 of their petition (Dillard) hardly resembles what actually occurred in the State of North Carolina.

In 1974, the General Assembly did abolish the death penalty for the crimes of burglary and arson. It mandated death for first degree murder or rape.

Each of the petitioners' petitions involve only the crimes of first degree murder or rape.

Jarrette was the first case to reach the Supreme Court for a crime committed subsequent to the Waddell decision.

In the Jarrette case, 284 N. C. 625, 202 S.E. 2d 721 (1974), the North Carolina Supreme Court was requested to reconsider its decision in Waddell. The court did and reaffirmed its decision, id. at page 654.

The Court noted in Jarrette at pages 650-655:

> The determination of what the statutes of this State mean, with reference to the punishment to be imposed for criminal offenses, is a question of State law and the determination thereof by this Court is authoritative. It is not a Federal question. Adderly v. Florida, 385 U. S. 39. . .reh.den., 385 U. S. 1026; Shuttlesworth v. Birmingham, 382 U. S. 87. . . .
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> The contention of [Jarrette] is that a state statute, which makes it mandatory that a defendant, fairly and lawfully convicted of first degree murder or of rape, be sentenced to death, violates the Eighth and Fourteenth Amendments to the Constitution of the United States.
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> This is, of course, a Federal question and our determination of it is subject to review by the Supreme Court of the United States, but we must make the initial determination and must do so in the light of decisions heretofore rendered by that Court.

C. THE MERE EXISTENCE OF PROSECUTORIAL DISCRETION, PLEA BARGAINING, AND EXECUTIVE CLEMENCY DO NOT BRING A MANDATORY DEATH PENALTY STATUTE WITHIN THE PROHIBITIONS OF THE FURMAN DECISION.

These questions were raised by petitioners in the North Carolina Supreme Court. As our court noted in the Jarrette case, 288 N. C. at 656:

> Although the mere statement of these contentions, in clear and simple terms, seems sufficient to show their lack of substance, the seriousness with which they are advanced impels us to take note of them briefly.

The court then addressed itself to each of the contentions of Jarrette and its answers are set forth at 288 N. C. 656-666. These are found in Petitioner Jarrette's petition (No. 77-6877), Appendix "A", 202 S.E. 2d 721 at pages 741-747.

The respondent, State of North Carolina, is unable, after research, to improve upon the reasoning and line of authorities set forth in the Jarrette opinion as noted immediately above. Accordingly, respondent adopts that reasoning and line of authorities as its response in this Court to the petitioners' contentions which are set forth in the Dillard Petition (No. 77-6875) at pages 28-51.

D. CONTEMPORARY STANDARDS OF ONE OR MORE STATES OR THE FEDERAL GOVERNMENT CANNOT BE THE BASIS FOR ABROGATING RIGHTS OF OTHER STATES RESERVED TO THEM BY THE TENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

This Court only recently had to resort to first principles of constitutional government as established in the United States of America, United States v. Richard M. Nixon, _____ U.S. _____, 41 L.Ed 2d 1039 (1974):

> Our system of government "requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch." Powell v. McCormack, supra, 589, 23 L Ed 2d 491. And in Baker v. Carr, 369 U.S. at 211, 71 Ed 2d 663, the Court stated: "Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution."

• • • •

Notwithstanding the deference each branch must accord the others, the "judicial power of the United States" vested in the federal courts by Art III, § 1 of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government. The Federalist, No. 47, p. 313.

• • • •

In designing the structure of our Government and dividing and allocating the sovereign power among three coequal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence.

"While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635, 96 L Ed 1153, 72 S Ct 863, 26 ALR2d 1378 (1952) (Jackson, J., concurring).

This Court noted that unreasonable constitutional claims can "upset the constitutional balance of a workable government". (41 L.Ed.2d at 1063).

Of course, the Court in Nixon was addressing itself to allocating the sovereign power between the three branches of the federal government.

Under the regime of constitutional law as established in the United States, the separation of powers and checks and balances as a means to maintain liberty went further than separating only the three branches of the federal government. The constitutional scheme places heavy reliance upon the independence and sovereignity of the states. A. T. Mason, Free Government in the Making, 3rd Ed. Oxford University Press (1965) at pages 140 and 141 observed:

"John Adams [was] certainly among the best-informed men in the country on political science...

• • • •

> Toward the end of his life Adams could take satisfaction in noting that the federal system followed his basic principle to an extraordinary degree, including, as he saw it, no less than eight balances: (1) states and territories against the central government; (2) the House of Representatives against the Senate; (3) the President against Congress; (4) the Judiciary against Congress; (5) the Senate against the President in matters of appointments and treaties; (6) the people against their Representatives; (7) the state legislatures against the Senate; (8) the Electoral College against the people.

Scott, Sovereign States and Suits, (1925) at pages 55-57, observes:

> Without laboring the matter further, it is abundantly clear that the States after the Declaration of 1776 were free, sovereign and independent, and they remained so, in the sense of international law, until they changed that status by their subsequent, and, as we shall see, voluntary act.

When the states changed their status with respect to the new government of the United States they did not surrender their sovereignty nor become mere "quasi-sovereigns". The states granted certain of their powers to the United States of America and as Hamilton stated in The Federalist (No. 45), "The Powers delegated by the proposed Constitution to the federal government are few and defined."

The proposition that the federal government is one of limited powers is so fundamental and so apparent that it needs little elaboration. As stated by Chief Justice Marshall in McCulloch v. Maryland 17 U.S. 316 (1819):

> "This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends . . . found it necessary to urge. That principle is now universally admitted. . . . We admit, as all must admit, that the powers of the [federal] government are limited, and that its limits are not to be transcended."

Justice Story, in Hunter v. Martin's Lessee, 14 U.S. 303, 325 (1816), said:

> "The government, then of the United States, can claim no powers which are not granted to it by the Constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication."

There, then can be no dispute that the federal government has no powers beyond those delegated to it in the Constitution. That is, it has only limited sovereignty.

This being so, then where does the remainder of the sovereign power lie? If the answer be "the people" then who has "the people" deemed should exercise the remaining powers of their sovereignty?

The State contends the answer is to be found in the Tenth Amendment to the Constitution.

It is the State's contention that two of the incidents of those sovereign powers reserved to the States are the power to define criminal conduct and to provide for the punishment therefor within the State's territory, limited only by the prohibition against cruel and unusual punishment contained in the Eighth Amendment.

Roscoe Pound in Volume II, Jurisprudence, part 12, Law and the State, at page 317 states:

> As a legal conception, sovereignty seems to mean the aggregate of powers possessed by the ruler or the ruling organs of a politically organized society. Internal sovereignty, then, is the aggregate of the powers of internal control possessed by the ruling organs of the society by virtue of which it is paramount over all action within. According to Sir Frederick Pollock it is the capacity "of making, declaring and amending the law . . . without reference to any other authority and without any legal limit to its own power."
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> But the idea of sovereignty begins with Bodin. He defined the state (republica) as an association governed by the highest power (suprema majestas) as the "highest power over citizens and subjects, free from laws" (legibus soluta). Its chief characteristic was the power to give law to all citizens.
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> At common law, social interests were largely secured by a doctrine that the king was parens patriae, father of his country. That is, he was the guardian of public and social interests of all kinds and hence his courts of law and of equity had a general superintendence of all matters where "public rights" (i.e. social interests or public interests) might be jeopardized.
>
> Criminal law is the primary resource of the legal order for securing social interests immediately as such. At common law, although prosecutions were in the name of the king and under the control of the Attorney General to the extent of his authority to enter nolle prosequi. (Pound, III Jurisprudence, Part 14, Scope, Subject Matter of Law, at p. 264).

Pound further discusses Interests in part 14 of Volume III, Jurisprudence at page 218, et. seq. He specifically discusses the interests of the state as a legal entity.

1. Interests of the state as a juristic person.

> No small part of international law is taken up with the interests of states which international law should secure against infringement by other states. Thus it has usually been said that the absolute or natural rights of states, meaning the interests which it is held should be secured, are: (1) The right of self-preservation and independence. This is analogous to the so-called natural rights of physical integrity and personal liberty ascribed to the individual. It is analogous to an individual interest of personality. [and] (2) The right of exclusive legislation and jurisdiction within its territory. This, too, is an interest of personality. It is an interest akin to the interest of the individual in being allowed to manage his own affairs freely. Juristically, it is secured as a liberty....

As the Tenth Amendment is directed toward maintaining the class of interests referred to by Pound as "public interests", id. (Vol. III at page 235), the United States of America is equally obligated to protect the State of North Carolina's exercise of its sovereign rights as it is to protect any other constitutionally protected right whether it be individual or state.

This Court, even if it desired to do so, can no more lawfully abrogate a constitutionally guaranteed right of a State than it can an individual. Thus "contemporary standards" of "society" cannot be a proper basis for abolishing the death penalty under the Eighth Amendment any more than the "contemporary standards" of the McCarthy era could abolish the rights guaranteed to the individual under the Fifth Amendment to the Constitution.

Only by the exercise of the sovereign power of the State through its legislators may the punishment for murder or rape be lessened in North Carolina.

No other body of men and women on the face of this earth are lawfully entitled to exercise that governmental power other than the people of North Carolina, either directly in revolution or by vote on a new Constitution.

II. NO CONFLICT OF DECISIONS BETWEEN THE NORTH CAROLINA COURT AND THIS COURT IS PRESENTED BECAUSE PETITIONERS' CONSTITUTIONAL RIGHTS TO PROCEDURAL DUE PROCESS WERE FULLY OBSERVED BY NORTH CAROLINA AT EACH STAGE -- PRETRIAL, TRIAL AND APPELLATE -- OF THE PROCEEDINGS.

In responding to the contentions of the petitioners alleging a denial of constitutionally guarded procedural rights, North Carolina notes that our Supreme Court addressed itself to each of the questions presented here.

Our Court unanimously held in each instance that what actually happened at the pretrial and trial proceedings were in full compliance with the decisions of this court aimed at obtaining procedural due process.

Accordingly, North Carolina submits there is no conflict between the decisions of our Supreme Court and the decisions of this Court and, therefore, petitioners' petitions for writs of certiorari as to those questions should be denied.

Perusal of the North Carolina Supreme Court's opinions which are attached to the petitions appendices "A" will reveal the accuracy of North Carolina's contention here.

However to assist this court in understanding the questions raised by petitioners, we have attempted to phrase each properly so as to clearly present the question petitioners seek to have this court review. Respondent has grouped them according to the stage of the proceedings below at which the question was raised.

A. At the Pre-trial Stage

1. The petitioner Jarrette's constitutional rights exemplified in Miranda v. Arizona, 384 U.S. 436 (1966) were observed by law officers interrogating Jarrette after his arrest. (Petitioner Jarrette's Question No. 8).

Jarrette contends that his confession given to FBI agents subsequent to his arrest was made without his fully understanding his rights which are exemplified in this Court's decision in Miranda, id.

The evidence demonstrates that Jarrette was intimately familiar with the criminal processes; he being an escapee from prison. He is a high school graduate and he had risen to the office of president of a chapter of the Jaycees. The FBI agents fully advised him of his rights and he signed a waiver of his rights before giving his confession to the law officers. The officers reduced his statements to writing but Jarrette refused to sign them explaining that he knew he would have a lawyer assigned to him upon his return to North Carolina. There is no contention that the written statement of the FBI agent is inaccurate. Nor is there any contention that Jarrette made the statement out of fear or hope induced by the agents.

In Miranda, this Court recognized the policy of the law that has a long standing history in North Carolina. That policy is that extra-judicial confessions made to law officers, if they are to be used as evidence at the trial, must be freely and voluntarily made and could not be as a result of fear of consequences or hope of reward or leniency induced by the officers. Miranda held that the officers must advise the suspect of his rights, and only when he knowingly and intelligently waived them could extra judicial confessions be used as evidence in the trial of the defendant.

Thus, when defendant objects to the introduction of the confession a question of fact is presented to be resolved. The burden of proof is upon the State to prove each element necessary to lay a proper foundation for the admissibility of the confession. This is done on voir dire and evidence is taken to prove the facts necessary for the foundation to be laid. The voir dire is adversary and evidence is adduced by both sides. The trier of fact answers the question of fact thus presented.

The question on appeal is not whether the appellate court would have resolved the issue presented by the evidence in the same manner in which the trial court resolves it, but whether the findings of ultimate fact are supported by substantial and competent evidence.

This was done in Jarrette's case and the entire proceeding was carried out with meticulous care.

Accordingly, North Carolina submits petitioner Jarrette's Question No. 4 contained in his petition should be denied.

2. Constitutional due process is not violated where police do not investigate, ad infinitum, every possible shred of evidence thought by a defendant to have some relationship to the crime with which he is charged. (Petitioner Noell's Question No. 4; Petitioner Henderson's Question No. 14).

Both Noell and Henderson contend that constitutional due process requires law officers assigned to a particular case to affirmatively investigate to its ultimate end, every possible bit and piece of evidence which comes to the officer's attention during the course of the investigation.

In both the Noell and Henderson cases, the law officers were faced with independent and credible evidence to establish the crime in question had been committed. They were also faced with a direct, positive eyewitness, identification evidence, plus independent corroborative evidence, that Noell and Henderson were the ones who perpetrated the crimes established.

Our court noted in the Noell case, 284 N. C. 670 at page 694:

> Police officers are under no duty to take any particular course of action when investigating a crime. Of course, they cannot suppress evidence, Brady v. Maryland, 373 U.S. 83 111 (1963). They are not required, however, to follow all investigative leads and to secure every possible bit of evidence. And their failure to do so is not prejudicial error [citing] People v. Baber, 31 Mich. App. 106, 187 N.W. 2d 508 (1971).

In People v. Baber, id. the Michigan Court held failure to follow all investigative leads did not give rise to a valid claim of a constitutional denial of due process. In accord are State v. Kelly, 110 Ariz. 196, 516 p.2d 569 (1973) and People v. Allen, 351 Mich 535 (1958).

The cases on which petitioners rely are particularly inapposite to the facts in these cases.

Brady v. Maryland, 373 U.S. 83 (1963); Giles v. Maryland, 386 U.S. 66 (1967); and Wardius v. Oregon, 412 U.S. 470 (1973) have nothing to do with the duty of police officers to pursue every imaginable investigative effort, but rather they are concerned with whether the police and prosecution must make available to the defendant discovered exculpatory evidence. Although the interests of the State are best served when justice is done, the defendant has no right to demand that the police pursue every investigative lead in a given case. A criminal accused has a right to trial by a jury and the courts, not by the police. There is no way to know what the evidence belatedly requested in these cases would have shown. The police considered that any evidence to be discovered by these means would be repetitive, cumulative identification testimony, and they were not arbitrary or capricious in that belief. There is nothing in the record to show that counsel requested the accumulation of this scientific evidence or proof that the defendants moved to suppress references to the discovery of the hair and blood stains at the trial.

The State contends the decisions of our Supreme Court in these two cases were properly decided and therefore petitioner Noell's Question No.4and petitioner Henderson's Question No. 14 should be denied further review by this Court.

1. The concept of constitutional due process does not prohibit police use of a "show up" identification procedure during the investigative stage of the case. (Petitioner Henderson's Questions Nos. 1 and 3).

As this court held recently in Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed. 2d 401 (1972), due process of law does not preclude the police from using a show up in order to obtain an identification of a criminal suspect; nor does the suspect need to have counsel present when the show up takes place before the commencement of adversary proceedings.

Petitioner Henderson (No. 73-6853) objects to the use of the show up identification procedure during the investigative stage of the case and before the commencement of adversary proceedings.

At the trial of the Henderson case, the state offered no evidence respecting the out-of-court identification. The state did offer an in-court identification, and prior to admitting an in-court identification the trial court held a complete voir dire hearing in order to determine whether the in-court identification had an origin adequately independent of the out-of-court identification. In its opinion, the North Carolina Supreme Court held that it was unnecessary for them to reach the question whether the out-of-court identification procedure used in this case was constitutionally impermissable because the trial court had held upon competent evidence that the in-court identification had an origin separate from the out-of-court identification. Nevertheless, the North Carolina Supreme Court very carefully considered the contention of petitioner that the use of a show up identification rather than a lineup identification was impermissable, 285 N.C. at 9-12. Our court cited the case of Kirby v. Illinois, 406 U.S. 682, (1972), for the proposition that the right to counsel at pre-trial identification procedures attaches only "at or after the time that adversary judicial proceedings have been initiated against him." The court said whether a show up identification violates due process depends on the totality of the circumstances. The court then held that the evidence in this case relative to the confrontation, particularly the fact that the confrontation took place a very short time after the crime was committed, led to the result that the out-of-court procedure used here in the investigative stages of the case was not improperly suggestive.

Because no evidence of the out-of-court identification was submitted at the trial, and because the trial court found upon competent evidence, as is to be discussed infra, the objections of the petitioner to the use of the show up present no question for review by the Supreme Court.

Accordingly, the State contends that petitioner Henderson's questions Nos. 1 and 3 should be denied further review by this Court.

8. Constitutional due process in a mandatory death penalty case does not require the state to seat a juror who has testified that because of his personal beliefs he would not return a verdict of guilty, even if satisfied from the evidence beyond a reasonable doubt as to the defendant's guilt. (Petitioner Noell's Question No. 2; Jarrette's Question No. 2).

Petitioner Noell (No. 77-6976, Question No. 2) and Petitioner Jarrette (No. 77-6977, Question No. 2) contend that the examination of the veniremen in each of these cases with respect to their expressed attitudes towards returning a verdict which involved the death penalty led to improper exclusion of jurors.

The case of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed. 2d 776 (1968) establishes two things: (1) Veniremen may not be challenged for cause simply because they voice general objection to the death penalty or express conscientious or religious scruple against its infliction; and (2) veniremen who are unwilling to consider all of the penalities provided by law and who are irrefutably committed, before the trial has begun, to vote against the death penalty regardless of the facts and circumstances that might emerge during the course of the trial may be challenged for cause on that ground. In Witherspoon at 510, this Court said:

> "The only justification the State has offered for the jury-selection technique employed here is that individuals who express serious reservations about capital punishment cannot be relied upon to vote for it even when the laws of the State and the instructions of the trial judge would make death the proper penalty. But in Illinois, as in other states, the jury is given broad discretion to decide whether or not death is 'the proper penalty' in a given case, and a Juror's general views about capital punishment play an inevitable role in such decisions."

This language from Witherspoon reflects an important ground of the reasoning in that case -- a line of argument that is no longer applicable in North Carolina following the decisions of this court in Furman v. Georgia, 408 U.S. 238, (1972), and the

Supreme Court of North Carolina in State v. Waddell, 282 N.C. 431, 194 S.E. 2d (1973). No longer do North Carolina jurors decide whether death is "the proper penalty, for the law mandates the penalty of death for the enumerated crimes.

While the supportive argument of the petitioners Woell and Jarrette "that identifiable segments of the community [cannot be systematically excluded from jury panels]" correctly states the law, that proposition is not exactly hand-in-glove with the principle stated by this Court in Witherspoon that even though persons with scruples against the imposition of the death penalty constitute a sizeable group in many communities:

> . . . nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear: (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitudes toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." Witherspoon v. Illinois, 391 U.S. 510, fn. 21 at page 522.

Such veniremen as were excluded in these cases, although they may constitute an identifiable segment of the community, have no place on a trial jury, the sole function of which is to find guilt or innocence. Their views respecting the propriety of the death penalty are a mere irrelevancy where the penalty is set by the law, and the jury has no discretion to set the penalty. All that happened in these cases is that the court held in each instance that such veniremen could be excluded.

Even an examination of those portions of the voir dire examination quoted in the petitions in these cases discloses that the excluded jurors stated that they were irrevocably committed to vote against a verdict requiring the imposition of the death penalty, without regard to what the evidence might show. The North Carolina court, in each case, observed correctly that these jurors had made up their minds before the trial began. The question is one of the application of settled law to familiar facts, and it is not sufficiently important to require review.

5. Constitutional due process does not require the state to furnish a transcript of the voir dire examination of the jury when defendant has not requested such a transcript. (Petitioner Honeycutt's Question No. 2).

Petitioner Honeycutt (No. 73-7032, Question No. 2) claims that constitutional due process requires the state to furnish a transcript of the voir dire examination of prospective trial jurors in a capital case even in the absence of a request.

The question is not properly before the Court because for all that appears in the record the question is raised for the first time in the petition for certiorari. The question was niether raised in nor passed upon by the Supreme Court of North Carolina, nor does it appear in the record that a request was made to the trial court that a transcript be made and made available to the petitioner.

As this Court said in Williams v. Georgia, 349 U.S. 375, 382 (1954), "A state procedural rule which forbids the raising of a federal question at late stages of the case, or by any other than a prescribed method, has been recognized as a valid exercise of State power." See also, Chambers v. Mississippi, 410 U.S. 284, at 308 et.seq. (1973) (opinion of Rehnquist, J.).

The rule of appellate practice in North Carolina is to the effect that the "Supreme Court will not decide questions which have not been presented or adjudicated in the court below, especially questions relating to the constitutionality of a statute or an act of Congress". 1 Strong's, N.C. Index 2d, p. 106 (1967), and cases there cited.

There is a second reason that this Court should not grant certiorari to question No. 2 raised by the petitioner, Honeycutt, as to the requirement of a transcript of the voir dire examination of jurors. It is not the practice in North Carolina to make a transcript of the voir dire examination of jurors unless the transcript is requested by the petitioner. But if such transcript is requested, it is granted as a matter of course. State v. Fowler, 285 N. C. 90, 103-107 (1974). The

Supreme Court of North Carolina in the Fowler case said, 285 N. C. at 107:

> It is the primary duty of defense counsel to prepare and docket a true and adequate transcript of the record of the case on appeal in a criminal case. State v. Fox, 277 N. C. 1, 175 S.E. 2d 561 (1970); State v. Roux, 263 N. C. 149, 139 S.E. 2d 189 (1964); G.S. 15-180; G.S. 1-282. It is also the duty of the solicitor to scrutinize the copy that the appellant serves upon him. If it contains errors or omissions, it is the solicitor's responsibility to file exceptions or countercases. State v. Fox, supra. If, as in the present case, defense counsel desires to take exception to the act of the Court in excusing a prospective juror, he should either enter into a stipulation with the State setting out in detail the reason for excusing the juror, or he should include a transcript of the voir dire examination as to that juror in the case on appeal. He should not take exception to his own failure to prepare and docket a true and adequate transcript of the record in the case on appeal. Such action is not approved.

The principle underlying the right to counsel case Gideon v. Wainwright, 372 U.S. 335 (1963), is that the criminal defendant should have at his disposal a trained advocate who knows the law and is able to adequately preserve his rights. All that has happened in this case is that Honeycutt's counsel failed to request that a transcript of the voir dire examination be made and failed to put a transcript of that voir dire examination into the record. In no sense of the word has the State of North Carolina denied this petitioner a transcript of the voir dire examination of jurors in his case in order that he might preserve his rights under Witherspoon v. Illinois, supra..

6. Constitutional due process does not require that a jury include black members where the defendant is a black when there is no systematic exclusion of blacks from jury service. (Petitioner Noell's Question No. 5).

Petitioner Noell, (No. 73-6876, Question No. 5) challenges his conviction on the grounds that the State used its peremptory challenges in such a way that all the black veniremen were ultimately excluded from the petit jury.

The record demonstrates that the black veniremen were excluded for cause, because they knew the defendant or his family, or because they further stated that their knowledge of defendant and his family would prevent them from being able to return a fair and impartial verdict upon the evidence presented. A very few of the black veniremen were excluded because of their expressed attitudes toward returning a verdict which might entail the imposition of capital punishment. Only one black venireman was excluded peremptorily by the state.

In State v. Peoples, 131 N.C. 784, 42 S.E. 814 (1902) the North Carolina Supreme Court held that the North Carolina Constitution, Art. I, § 28 requires the sustaining of a motion to quash an indictment of a Negro who proves that the members of his race have been systematically excluded from the juries of the county in which he was indicted. The North Carolina courts have consistently followed that principle to the present, State v. Knight, 269 N.C. 100, 152 S.E. 2d 179 (1967).

As the North Carolina Supreme Court said in this case, 284 N.C. at 683, 202 S.E. 2d 750, 759:

> Defendant's mere showing that all Negroes in this case were challenged by the solicitor is not sufficient to establish a prima facia case of an arbitary and systematic exclusion of Negroes. The record is silent about any prior instances in which the solicitor challenged such arbitary and systematic exclusion, and he has failed to carry that burden."
>
> A defendant has no right to be tried by jury containing members of his own race or even to have a representative of his own race to serve on the jury. Defendant does have a right to be tried by a jury from which members of his own race have not been systematically and arbitarily excluded. The burden is upon the defendant, however, to establish racial discrimination in the composition of the jury. State v. Cornell, 281 N.C. 20, 187.

In Swain v. Alabama, 380 U.S. 202, 222, (1965) this Court in discussing the question of peremptory challenges stated:

> "In the light of the purpose of the peremptory system... we cannot hold that the Constitution requires examination of the prosecutor's reasons for the exercise of his challenges in any given case. The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the Court. The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes. Any other result, we think, would establish a rule wholly at odds with the peremptory challenge system as we know it.

To impute to the solicitor the motive of racial discrimination in the use of his peremptory challenge to one black is wholly unsupported by the record. It must be presumed that he used his challenge to obtain a fair and impartial jury, as our Supreme Court held.

Accordingly, the State contends that petitioner Neal's Question No. 5 should be denied further review by this Court.

7. Constitutional due process does not require a change of venue for the trial of a criminal case merely upon the showing of wide publication of the crime involved. (Petitioner Jarrette's question No. 8).

Petitioner Jarrette (No. 77-1027, question No. 8) contends he was denied due process of law in that the trial court did not grant a change of venue on the grounds of prejudicial pre-trial publicity.

Jarrette's evidence consisted of six affidavits, in substance, that the affiants had read numerous newspaper accounts concerning the charges against Jarrette; that they had seen various television news programs concerning the crimes with which Jarrette was accused; and that due to that publicity they had formed the opinion that Jarrette was guilty.

The state's evidence consisted of testimony of nine witnesses who testified, in substance, that they believed that the petitioner could receive a fair trial in Union County.

The trial court found:

> "[w]hat due to the nature of the Jaycee program under which [Jarrette] was being allowed to participate, he received statewide publicity, the Court being of the opinion that the questions presented by the motion can and shall be presented to each juror as they are summoned to the end that no one shall be allowed to serve who has formed and expressed an opinion as to the defendant's guilt on any one of the charges to which he stands trial, and that each prospective juror is questioned by counsel for the defendant as to whether or not he can give the defendant a fair and impartial trial based solely upon the evidence as it comes from the witness stand in the course of the trial and based on nothing else,. . ."

Each prospective juror was examined extensively on voir dire prior to being seated. The twelve finally seated each testified they had no fixed opinion of Jarrette's guilt or innocence and could give both the State and Jarrette a fair verdict based only upon the evidence given in open court.

All that has happened in this case, and all that the cases in this Court require, is that the trial judge conduct a hearing respecting the motion for change of venue or change of venire, fairly consider all the evidence, and based on that evidence find that the defendant can receive a fair trial before an unbiased jury.

Under N. C. Gen. Stat. §1-88, these rotions were addressed to the discretion of the trial court. State v. Blackmon, 280 N. C. 82, 185 S.E. 2d 133 (1978). The cases in this Court indicate that on the basis of that statute and the evidence the trial court properly observed due process. Irvin v. Dowd, 366 U.S. 717 (1960); Rideau v. Louisiana, 373 U.S. 723 (1963); Estes v. Texas, 381 U.S. 532 (1965); Sheppard v. Maxwell, 384 U.S. 333 (1966); Groppi v. Wisconsin, 400 U.S. 505 (1971).

According , the State submitspetitioner Jarrette's question No. 8 should not be further reviewed by this Court.

F. At the Trial Stage.

1. The constitutional concept of due process does not require the exclusion of evidence of an independent in-court identification of the defendant as the perpetrator of the crime by the rape victim simply because the victim had previously identified the defendant as the perpetrator in a "show up" during the investigation of the crime by the law officers (Petitioner Henderson's Questions Nos. 2,4, and 5).

Petitioner Henderson (77-6852 Questions Nos. 2,4 and 5) contends his constitutional rights to due process were violated because he was subjected to a "show up" identification procedure in the investigation stage of the trial and he contends that this act of the law officers made the in-court identification by the same eyewitness (the rape victim) inadmissible at the trial.

Our Court noted the similarity of the present case with the

recent case of Neil v. Biggers, 409 U.S. 188. In the Neil case, this court noted:

> " ...the victim spent a considerable period of time with the assailant, up to half an hour. She was with him under adequate artificial light in her house and under a full moon out doors, and at least twice, once in the house and later in the woods, faced him directly and intimately ... her description to the police, which included the assailant's approximate age, height, weight, complexion, skin texture, build, and voice, ... was more than ordinarily thorough. she had 'no doubt' that the respondent was the person who raped her ... she testified ... that there was something about his face 'I don't think I could ever forget."

The North Carolina Supreme Court then noted a number of factors to be considered in evaluating the likelihood of mistaken identification. These are: (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, (5) the length of time between the crime and the confrontation.

On the trial court's voir dire hearing respecting the admissibility of the in-court identification the only evidence offered was the testimony of Judith Strader, the victim of the crime.

On the voir dire examination, Miss Strader positively identified the petitioner as her assailant. She testified that the lighting conditions surrounding her trailer at the time of her attack were a light that had been left on in her living room, three street lights near her trailer, one of which shone almost directly into her bedroom window, and a half-full moon. She stated that the defendant had been in her bedroom for about an hour and that they talked for about thirty to thirty-five minutes after the attack. She at that time observed the defendant carefully because she "was looking for facial characteristics, things I might be able to pick out." She stated that her identification of the petitioner was based on "his hair line, length of hair, eyebrows, and lips" and that he had been wearing a shirt, trousers, and laced boots. She stated that she had no

doubt whatsoever about the defendant's being the man who had been in her trailer on the night of the rape, and she based her identification " ... on the face that I saw that night and the face, you don't forget, I won't ever forget it ..."

Our Court then stated the rules governing the admissibility of in-court identifications as stated in State v. Tucale, 288 N.C. 515, 201 S.E. 2d 898:

> "When the admissibility of in-court identification testimony is challenged on the ground that it is tainted by out-of-court identification(s) made under constitutionally impermissible circumstances, the trial judge must make findings as to the background facts to determine whether the proffered testimony meets the test of admissibility. When the facts so found are supported by competent evidence, they are conclusive on an appellate court. State v. McVay, and State v. Simmons, 277 N.C. 810, 817, 177 S.E. 2d 878, 882 (1970); State v. McVay and State v. Simmons, 279 N.C. 220, 232, 181 S.E. 2d 655, 655 (1971); State v. Morris, 279 N. C. 477, 481, 183 S.E.2d 638, 637 (1971)."

In the Neil case, supra, this court said at 198:

> "Some general guidelines emerge from these cases as to the relationship between suggestiveness and misidentification. It is, first of all, apparent that the primary evil to be avoided is a very substantial likelihood of irreparable misidentification.' Simmons v. United States, 390 U.S. at 384. While the phrase was coined as a standard for determining whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification, with the deletion of "irreparable" it serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself."

Unless this Court is willing to state a per se rule of inadmissability of identification evidence obtained through show up procedures which take place following the decision in Stovall v. Denno, 388 U.S. 293 (1967) then the question as to the admissibility of the identification here poses no substantial question for review by this Court.

2. The constitutional concept of due process does not require a mistrial where a witness spontaneously and voluntarily gives evidence of a non-inflammatory nature and the trial judge immediately orders the testimony stricken and instructs the jury to disregard the spontaneous utterance of the witness. (Petitioner Noell's Question No. 4; Petitioner Crowder's Question No. 3).

Petitioner Crowder, (No. 73-6878, Question No. 2) and Petitioner Noell (No. 73-6876, Question No. 4) contend that they were denied due process because of prosecutorial misconduct.

In the Noell case the allegation of prosecutorial misconduct is based on the following examination of the witness Mary Ford:

> Q. (Mr. Pearce) Mrs. Ford, were any tests conducted there at the hospital on Miss Dicenzo?
> A. (Mrs. Ford) Yes; there were.
> Q. (Mr. Pearce) What were they, if you know of your own knowledge?
> A. (Mrs. Ford) There were slides done, surgical secretion, bubble secretion, which is normal procedure in any normal rape case.

In the Crowder case, the following transaction forms the basis for the allegation of prosecutorial misconduct:

> "Jacquelyn Otelie Bryant, sister of the deceased, testified that the defendant had been dating the deceased from July or August, 1972 until the date she was shot. The solicitor then asked the witness if she knew of her own knowledge where defendant and deceased met. Defendant's objection to that question was overruled and the witness replied: "She met him in Caledonia in prison." Objection was then sustained and the jury was instructed not to consider the answer. At defendant's request the jury was excused and defendant moved for a mistrial on the ground that the answer was so highly prejudicial the error could not be cured by the Court's instruction." (285 N.C. at 47).

The objection on constitutional grounds to either of these evidentiary rulings was first made in the petitions in this Court for certorari.

The Supreme Court of North Carolina dealt with both these instructions to the jury to disregard the evidence. In the Noell case, our court said (284 N.C. at 688, 202 S.E. 2d at 762), when:

> . . .the jury is instructed to disregard such evidence is cured. It is presumed that the jurors followed the court's instructions in this case to disregard this evidence and to dismiss it from their minds. Justice Sharp in State v. Moore, 276 N.C. 165, 171 S.E. 2d 853 (1970) quoted with approval from State v. Ray, 212 N.C. 225, 198 S.E. 20 882 (1938) wherein it was stated: ...[o]ur system for the administration of justice through trial by jury is based on the assumption that the trial jurors are men of character and of sufficient intelligence to fully understand and comply with the instruction of the court, and are presumed to have done so. Wilson v. Mfg. Co., 120 N.C. 98, 26 S.E. 628."

In the present case the court's prompt action in sustaining defendant's objection, allowing his motion to strike, and instructing the jury not to consider what the surgical nurse told her and to dismiss that from their minds - was sufficient to eliminate any possible prejudice to defendant."

Petitioner Crowder contends that when the District Attorney asked the witness if she knew where the deceased met defendant and the witness answered "she met him in Caledonia, in prison," then the only inference to be drawn is that defendant was in prison as a convict and the District Attorney knew that to be a fact and sought to get that answer before the jury.

Such inferences just don't arise. First, the District Attorneys' questions only called for a "yes" or "no" answer. Second, there is no more reason to believe the defendant was a convict than that the decedent was a convict. Third, there is no reason to believe that either were convicts instead of employees. Fourth, there is not the slightest hint in the record that the District Attorney knew: (a) where they met or (b) what the witness answer would be.

Petitioners ask this Court to establish as a rule of law, absent evidence to the contrary, a presumption of misconduct on the part of officers of the Court when the officer represents the public against a criminal.

This is a novel concept indeed. For as Justice Ervin (now U.S. Senator, D.N.C.) said in State v. Gaston, 236 N.C. 499 at page 502:

> ...[w]e merely apply the presumption that in the absence of evidence to the contrary, courts are bound to presume that the acts of public officers are in all respects regular. State v. Wood, 175 N.C. 809, 95 S.E. 1050; State v. Bridgers, 87 N.C. 562.

3. Constitutional due process does not require the trial judge to instruct the jury that if the jury convicts the defendant of rape the punishment shall be death, where neither the judge nor the jury have any discretion as to punishment upon conviction of a capital crime (Petitioner Henderson's Question Nos. 11 & 12).

Henderson contends he was denied due process because the trial judge did not instruct the jury that if they found him guilty of rape, the sentence would be death.

The State's contention is that in State v. Henderson, 285 N. C. 1, 203 S.E. 2d 10 (1974) the North Carolina Supreme Court properly applied the general rule:

> " ...[T]hat the trial judge has the sole responsibility to render judgements upon jury verdicts upon the limits prescribed by statute. The sole responsibility of the jury is to decide the guilt or innocence of the accused without being hindered by the quantum of punishment possible, probable or certain upon conviction. State v. Davis, 238 N.C. 252, 77 S.E.2d 630; State v. Howard, 222 N.C. 291, 11 S.E.2d 917." (285 N.C. at p. 20).

This decision is further consistent with the language of our court in State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973):

> "The punishment to be imposed for these capital felonies is no longer a proper subject for an instruction by the judge."

This being the general rule, the Supreme Court of North Carolina has allowed for an exception to it only in the presence of "compelling reasons". Our court in State v. Rhodes, 275 N.C. 594, 160 S.E.2d 846, a case decided before Furman (and in North Carolina, Waddell), observed that:

"In this jurisdiction, except in one classification, the presiding judge fixes the punishment for a convicted defendant within the limit provided by the applicable statute. The exception is capital cases in which the jury may reduce the penalty from death to life imprisonment.... in all other instances, the jury has performed its function and discharged its duty when it returns its verdict of guilty or not guilty... 275 N.C. 584, 587-588,

...In the absence of some compelling reason which makes disclosure as to punishment necessary in order to keep the trial on an even keel and to insure complete fairness to all parties, the trial judge should not inform the jurors as to the punishment in non-capital cases. If information is requested he should refuse it and explain to them that punishment is totally irrelevant to the issue of guilt or innocence. When, however, such information is inadvertently given, the error will be evaluated like any other. (275 N.C. at p.592).

Petitioner relies on State v. Britt, 285 N.C. 256 (1974) as an instance in which the right was recognized. However, Britt is clearly distinguishable from Henderson. As our court made clear in Britt:

"Thus in a capital case if the jury appears to be confused or uncertain, the trial judge should act to alleviate such uncertainty or confusion. Specifically, if the trial judge observes that the jury is confused or uncertain as to whether one of its permissive verdicts would result in a mandatory death sentence, in our opinion, sufficient compelling reason exists to justify his informing the jury of the consequence of the possible verdicts. (285 N.C. at page 272).

In [the Britt] case, when the jury returned the verdict of "first degree murder, with mercy," it became apparent that the jurors were confused as to the law and as to their duties as jurors. At that point the trial judge should have informed them that under the existing law, neither the jury nor the Court had any discretion as to punishment if the jury returned a verdict of guilty of first degree murder." (285 N.C. at p. 272).

The Court reinforced its view of the particularly compelling nature of Britt with the following language:

"The need for such action on the part of the trial judge is underscored by the fact that on two occasions the trial judge used language in the presence of the jury which might well have left the jury with the erronous impression that he had some discretion in imposing punishment in the event the jury returned a verdict of guilty of murder in the first degree. Further the gravity of this case, and the apparent confusion and uncertainty among the jurors when the unaccepted verdict was returned, demanded more clarification as to possible verdicts than the statement: 'The verdict must be either guilty of murder in the first degree or guilty of what ever you find him guilty of.'" (Emphasis added). (285 N.C. at p.273-3).

It should be noted that our court in Britt did not require the punishment to be administered should be spelled out, but only that the judge make it clear to the jury that neither he nor they had any discretion in this regard should they return a verdict of guilty of murder in the first degree.

In Henderson, no suggestion had been made nor is it apparent from the record that the judge in his instructions gave an erroneous impression to the jury. Further, it is clear that during the deliberations, when some question did arise in the minds of the jurors as to "recommendations", the trial judge made the role of the jury clear in unambiguous terms. Henderson and Britt are distinguishable, in that in Henderson the general rule was properly called for and applied rather than its exception as defined in Britt.

Accordingly, further review of Henderson's question Nos. 11 and 12 should be denied.

4. Constitutional due process does not require that the state permit defense counsel to argue the propriety of the death penalty to the jury when neither the judge nor the jury has any discretion as to punishment upon conviction of a capital crime (Petitioner Dillard's Question No. 2).

Petitioner Dillard (No. 73-6675, Question No. 2) contends he was denied due process because his counsel was not permitted to argue the propriety of the death sentence to the jury.

The State contends the rule that counsel for the defendant may not argue the question of punishment to the jury logically follows the general rule that the determination of punishment is not a matter for the jury. To permit otherwise would be to condone pleas of passion and to encourage the jury to ignore the law as it is, to abandon its role as trier of fact, and thus to act instead as a legislature.

This general rule as applied in Dillard must be contrasted with the application of its long standing statutory exception in Britt thus stated:

"Such an argument to the jury would be improper for the reason that the law of this State is otherwise. Counsel may, in his argument to the jury, in any case, read or state to the jury a statute or other rule of law relevant to such case, including the statutory provision fixing the punishment for the offense charged. He may not, however, state the law incorrectly or read to the jury a statutory provision which has been declared unconstitutional. See, State v. Banner, 149 N.C. 519, 526, 63 S.E. 88. Nor may counsel argue to the jury that the law ought to be otherwise, that the punishment provided thereby is too severe and, therefore, the jury should find the defendant not guilty of the offense charged but find him guilty of a lesser offense or acquit him entirely.

State v. Dillard, supra, did not hold that counsel, in his argument to the jury, cannot inform or remind the jury that the death penalty must be imposed in the event it should return a verdict of guilty upon a capital charge. Rather Dillard stands for the proposition that counsel may not argue the question of punishment in the sense of attacking the validity, constitutionality, or propriety of the imposition of the death penalty. (State v. Britt, 285 N.C. at p. 277).

The petitioner's claim that the Court, by denying his request to argue the question of punishment, deprived the defendant of his right to recite the law as it is, as permitted in Britt, ignores the fact that the petitioner could have easily, and with considerable case and statutory precedent, so read the applicable statute. In this case the petitioner either failed to recognize or otherwise ignored this distinction and our Court should not be required to "read between the lines" of such a request. See State v. Crisp, 288 N.C. 407, 98 S.E. 2d 802, 67 A.L.R. 2d 236; Annot. 67 A.L.R. 2d 285.

Accordingly, petitioner Dillard's question No. 2 should be denied further review by this Court.

5. Constitutional due process does not require the trial judge to instruct the jury as to lesser included offenses when the charge laid in the indictment and all of the state's evidence introduced at trial, tend to prove that only the capital offense, if any, was committed. (Petitioner Henderson's Question No. 11).

The contention of petitioner Henderson in his Question No. 11 seems to be addressed to the failure of the trial court to charge the jury with respect to the lesser included offenses of burglary and rape.

As our Court said in this case, 285 N.C. at 23, 203 S.E.2d at 24:

"The necessity of instructing a jury as to an included crime of lesser degree than the one charged arises only when there is evidence supporting the included crime of lesser degree. State v. Watson, 283 N.C. 383, 196 S.E.2d 12; State v. Bryant, 280 N. C. 551, 187 S.E.2d 111; State v. Carnes, 279 N.C. 589, 184 S.E.2d 235; State v. Murry, 277 N.C. 197, 176 S.E.2d 738; and State v. McNeil, 280 N.C. 159, 185 S.E.2d 156]."

It is difficult to understand the petitioner's contention that he was denied due process of law because the only evidence introduced by the prosecution went to the proof of the capital crimes of burglary and rape. The jury thus had to find the petitioner guilty or not guilty of those crimes and those crimes alone, rather than the more numerous conviction options which would have been open to the jury had there been instructions on the lesser included offenses. The state introduced evidence tending to show the guilt of the petitioner of only two crimes, and the State had the burden of proving beyond a reasonable doubt each and every element of those two crimes, including that Henderson was the perpetrator thereof.

It seems that petitioner's argument regarding the defense of alibi is confused with something else. It is settled in North Carolina that the defendant is entitled to an instruction on the defense of alibi whether he requests it or not. State v. Vance, 277 N.C. 385 177 S.E.2d 389 (1970); State v. Spencer, 256 N.C. 487, 124 S.E.2d 175 (1962). The burden of proving the defense of alibi does not rest on the defendant. In State v. Walston, 259 N.C. 385, 130 S.E. 2d 636 (1963) the court stated at page 386:

"The burden of proof rests upon the State to establish beyond a reasonable doubt all elements of the offense charged, including the defendant's presence at the place of the crime, at the time of its commission, where that is essential to his guilt."

In State v. Vance, supra. at 387 our Court said:

"An accused, who relies on an alibi does not have the burden of proving it. It is incumbent on the State to satisfy the jury on the whole evidence that such accused is guilty. If the evidence of an alibi, in connection with all other testimony in the case, leaves the jury with a reasonable doubt of the guilt of the accused, the State fails to carry the burden of proof imposed upon it by law, and the accused is entitled to an acquittal."

Finally, the question as posed fails to raise a Federal constitutional question. The leading case in the Fourth Circuit Court of Appeals on this point is Grundler v. North Carolina, 283 F.2d 798 (4th Cir. 1960). The language of the Court in that case is most apropos to the question raised here, 283 F. 2d 802:

> The points made in the present proceeding all pertain to state law and in the context of the trial we find no indication of fundamental unfairness. We express no opinion as to the state court's resolution of the issue raised. Even if we were to disagree, we could not intervene..., when the alleged errors are of a character that cannot reasonably be said to involve a deprivation of constitutional rights. Normally, the admissibility of evidence, the sufficiency of evidence, and instructions to the jury in state trials are matters of state law and procedure not involving federal constitutional issues. It is only in circumstances impugning fundamental fairness or infringing specific constitutional protections that a federal question is presented."

Accordingly, the State contends petitioner Henderson's question No. 13 should not be further reviewed by this Court.

C. <u>At the Appellate Stage</u>.

1. The concept of constitutional due process does not require that the state assume the burden of proving the negative of any issue raised by a defendant on appeal in a capital case. (Petitioner Henderson's Question No. 10).

Petitioner Henderson (73-6853 Question No. 10) contends that because of the severity of the death penalty the burden of proving that state officials have not acted in an arbitrary, capricious, or discriminatory manner toward the defendant should fall upon the state on appeal and absent such proof, constitutional due process requires the reversal of his conviction.

As the cases cited by Henderson in his petition simply don't stand for any such proposition of law whether constitutional or otherwise, the contention is difficult to respond to.

The existing law in North Carolina is that it will be presumed that a public official in the performance of an official duty has acted in good faith and in accordance with the law and the authority conferred on him. The burden is upon the party

asserting the contrary to overcome the presumption by competent and substantial evidence, Housing Authority of Wilson v. Wooten, 257 N.C. 758, 126 S.E.2d 101 (1962).

Allegata without probata won't prevail in the Courts of North Carolina and should not prevail in this Court:

> . . .The ends of criminal justice would be defeated if judgments [of courts] were to be founded on a partial or speculative presentation of the facts. . . . U.S. vs. Nixon, ___U.S.___ 41 L.Ed. 2d at p. 1068 (1978).

Accordingly, the State contends Henderson's question No. 1 should not be reviewed by this Court.

CONCLUSION

The State of North Carolina, respondent in each of the captioned cases, respectfully requests this Court deny each the petitioners' petitions for writs of certiorari to the Supreme Court of North Carolina except that respondent has no objection to a review of the question whether capital punishment is cruel and unusual per se.

Respectfully submitted this the 29th day of September, 1978.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is a Deputy Attorney General licensed to practice law in the State of North Carolina and the United State Supreme Court.

That on September 20, 1974, he served a copy of the attached RESPONSE OF THE STATE OF NORTH CAROLINA TO PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA to the persons hereinafter named, at the places and addresses stated below by depositing said envelope and its contents in the United States mail at Raleigh, North Carolina.

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